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STATE OF CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2021-

In the Matter of the Petition for Reconsideration of

James V. Simoni

Regarding Order WR 2021-0001
Administrative Civil Liability Order Against James V. Simoni
Statement of Water Diversion and Use S000486

SOURCE: Uvas Creek, tributary to Pajaro River

COUNTY: Santa Clara

ORDER DENYING PETITION FOR RECONSIDERATION

BY THE BOARD:

1.0 **INTRODUCTION**

On February 4, 2021, James V. Simoni (Petitioner) filed a petition for reconsideration of [Order WR 2021-0001](#), which the State Water Resources Control Board (State Water Board or Board) adopted on January 5, 2021. Order WR 2021-0001 adopted a proposed order prepared by the Presiding Hearing Officer of the Board's Administrative Hearings Office (AHO). Order WR 2021-0001 imposed administrative civil liability in the amount of \$6,000 against Petitioner for Petitioner's failure to timely file a supplemental statement of water diversion and use for his 2018 diversions, as required by title 23, section 920 of the California Code of Regulations.¹

For the reasons discussed in this order, the Board denies the petition for reconsideration.

¹ Unless otherwise indicated, all citations in this order to sections are to sections in title 23 of the California Code of Regulations.

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2.0 GROUND FOR RECONSIDERATION OF A DECISION OR ORDER

Any interested person may petition the State Water Board for reconsideration of a water rights decision or order within 30 days on any of the following grounds:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

(§ 768.)

Water Code section 1122 provides that the State Water Board shall order or deny reconsideration on a petition within 90 days from the date on which the Board adopts the decision or order. If the State Water Board fails to act within that 90-day period, the petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition. ([State Water Board Order WR 2009-0061](#) at p. 2, fn. 1; see *California Correctional Peace Officers Association v. State Personnel Board* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151; [State Water Board Order WQ 98-05-UST](#) at pp. 3-4.)

3.0 BACKGROUND

The relevant facts are described in Order WR 2021-0001. The following paragraphs provide a brief summary.

Petitioner is the current owner of record of the water-right claims in Statement S000486, which Petitioner's predecessor in interest filed with the State Water Board's predecessor, the State Water Rights Board. (See AR, S000486 Statements, Original Statement S000486.)² Under Statement S000486, Petitioner claims a riparian right to divert and use water from Uvas Creek.

After a diverter files an initial statement of diversion and use with the State Water Board, section 920 of the regulations and Water Code section 5104 require that the diverter file a supplemental statement of diversion and use for each year's diversions and use no later than July 1 of the following year.

Water Code section 1846, subdivision (a)(2) provides that the State Water Board may administratively impose civil liability against any person or entity who violates a regulation or order adopted by the State Water Board. The amount of civil liability may not exceed \$500 per violation per day.

² "AR" refers to the electronic administrative record the AHO has prepared for this proceeding and posted on the AHO's FTP site. AR citations are to folders and files in the AR.

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On February 15, 2019, the State Water Board's Division of Water Rights (Division) issued a letter to Petitioner, reminding Petitioner of the requirement to submit the 2018 supplemental statement for Statement S000486 by July 1, 2019. (Exh. PT-2; Order WR 2021-0001, pp. 7-8.)³

Petitioner did not submit the 2018 supplemental statement for Statement S000486 online by the July 1, 2019 deadline. (Order WR 2021-0001, p. 6.)

On August 30, 2019, enforcement staff for the Division (Prosecution Team) issued a Notice of Deficiency informing Petitioner that his supplemental statement of water diversion and use for 2018 diversions under Statement S000486 was due July 1, 2019. The Notice of Deficiency warned of a potential fine of up to \$500 per day should the violation persist. The Notice of Deficiency also included instructions for online reporting specifically for Statement S000486 and for contacting Division staff with questions or concerns. (Exh. PT-5; Order WR 2021-0001, pp. 7-8, 17.) Petitioner did not respond to the Notice of Deficiency.

On October 18, 2019, the Prosecution Team issued an administrative civil liability complaint (ACL Complaint) against Petitioner. The ACL Complaint recommended administrative civil liability in the amount of \$2,000 for these violations. (Exh. PT-6; Order WR 2021-0001, pp. 1-2.)

The cover letter and ACL Complaint informed Petitioner of the right to hearing and provided information regarding the process for making such a request and the hearing process that would follow such a request. (Exh. PT-6; Order WR 2021-0001, p. 2.)

On November 19, 2019, Petitioner requested hearing on the ACL Complaint. (Simoni Exh. D; Order WR 2021-0001, pp. 3, 18.)

On June 9, 2020, Petitioner electronically submitted his supplemental statement for his 2018 diversions under Statement S000486 through the State Water Board's electronic Water Rights Information Management System (eWRIMS) Report Management System (RMS).

The AHO held a hearing on the ACL Complaint against Petitioner on July 24, 2020. (AR, 2020-07-24 audio + video file of hearing; Order WR 2021-0001, pp. 4-5.)

On October 21, 2020, the AHO's Presiding Hearing Officer transmitted a proposed order to the State Water Board for action, under section 1114, subdivision (c)(2) of the Water Code.

On January 5, 2021, after receiving a presentation by the AHO Presiding Hearing Officer, and oral comments by Petitioner and by the Prosecution Team's attorney, and after a discussion by Board Members, the State Water Board unanimously adopted the AHO's proposed order as Order WR 2021-0001. The order imposes administrative civil

³ "Exh." refers to exhibits in the administrative record that were submitted by the parties.

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liability of \$6,000. (Order WR 2021-0001, p. 22; AR, 2021-01-05 SWRCB meeting recording (video+audio).)

On February 4, 2021 the State Water Board received Petitioner's petition for reconsideration (Petition). Petitioner requests that the Board "reduce or eliminate" the administrative civil liability that the Board assessed in Order WR 2021-0001. (*Id.*, p. 3.)

4.0 DISCUSSION

Petitioner makes 14 arguments in his petition for reconsideration. These arguments and our responses are discussed here.

Petitioner's Argument 1: "The size of the penalty was based on evidence **manufactured by the State Water Boards computer reporting system** and not on the testimony or evidence provided in the Statement of Water Diversion and use for S000486. This is an abuse of discretion and irregularity preventing a fair hearing. Calif Code Regulations §768(a) & (b)" (Petition, p. 1, bold in original.)

Response: Section 3.6 and subsections 3.6.1 through 3.6.6 on pages 12-22 of Order WR 2021-0001 describe the analysis the Board followed to determine the amount of the administrative civil liability. The order summarizes the reasons for this conclusion:⁴

The Board concludes that \$6,000 is the appropriate civil liability amount here. We believe that this civil penalty amount, which is substantially higher than the recommended amount in the ACL Complaint, is appropriate for several reasons. First, Respondent did not file his supplemental statement until almost one year after the filing deadline. Such substantial delays seriously undermine the Division of Water Rights' and the Board's ability to timely and effectively administer California's water rights system. Second, the statement for 2018 that Respondent finally filed clearly contains very substantial overstatements of the amounts that Respondent diverted in 2018. These significant inaccuracies significantly diminish the value of the data in Respondent's supplemental statements. Third, Respondent has made no effort to measure, or even to accurately estimate, the amounts of his monthly diversions despite the applicable statutory and regulatory requirements. Fourth, Respondent's filing for 2018 continued his persistent pattern of late, obviously inaccurate filings that began with the supplemental statement he filed for 2009. Fifth, Respondent still has not demonstrated any willingness to attempt to correct most of these deficiencies. This unwillingness is demonstrated by his supplemental statement for 2019, which, although filed before the deadline, contains the same obviously inaccurate monthly diversion amounts. This unwillingness also is demonstrated by the many meritless arguments (discussed above) Petitioner made before and during the hearing.

⁴ The quotation refers to Petitioner as "Respondent," because he was the respondent in the proceeding that led to Order WR 2021.0001.

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(Order WR 2021-0001, p. 22.) This analysis and these conclusions are based on substantial evidence in the administrative record, which is cited in the order. The AHO compiled the administrative record after conducting a fair hearing, during which Petitioner had an opportunity to present all of his evidence and arguments.

Petitioner's Argument 2: "The board has based is [sic] Order for a Civil Penalty upon an act that was unintentional and not willful. There is no basis in law for imposing a Civil Penalty on an unintentional act. *Kwan v. Mercedes-Benz of North America, Inc.* 23 Cal.App.4th 174 at pp. 184-185. This is an error in law Calif Code Regulations §768(d)" (Petition, p. 1.)

Response: *Kwan v. Mercedes-Benz of North America, Inc.*, (1994) 23 Cal.App.4th 174, involved a dispute between an automobile manufacturer and a purchaser under the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.). The applicable statute, Civil Code section 1794, subdivision (c) provides for civil penalties of up to twice the amount of actual damages, "[i]f the buyer establishes that the failure to comply was willful" (*Id.*, at p. 180.) The court's decision confirmed that these penalties may be imposed only for willful violations: "The civil penalty, however, is available under section 1794(c) only for some of these violations, the 'willful' ones." (*Id.*, at p. 184.)

There is no similar willfulness requirement in the statutes that apply here, Water Code sections 1055.3 and 1846. (See *People v. Matthews* (1992) 7 Cal.App.4th 1052, 1057–1058 [a statute that authorizes penalties for a violation of a regulatory requirement and does not require a showing of knowledge or intent to impose those penalties creates a strict liability offense].)

Petitioner's Argument 3: "The order's penalty amount is not based on evidence but rather is part of a system of ratcheting up penalties every step of the process to dissuade parties from asserting their rights. This is an error in law Calif Code Regulations §768(d)" (Petition, p. 1.)

State Water Board's Response: The Board's decision to impose the \$6,000 amount of administrative civil liability resulted from the Board's independent analysis of the evidence in the administrative record. (See Order WR 2021-0001, pp. 12-22.) The State Water Board does not have "any system ratcheting up penalties" for petitioners who exercise their rights to hearings. This is demonstrated by two other orders the Board recently adopted on other administrative civil liability complaints for other parties' failures to timely file annual water-right reports for 2018 diversions, Orders WR 2020-0111 and WR 2020-01112. In each of those orders, the State Water Board, after considering the relevant facts, decided to impose administrative civil liability in amounts that were significantly lower than the amounts the Prosecution Team had recommended in its complaints.

Petitioner's Argument 4: "The order is an **abuse of discretion and in fact is a capricious exercise of power** punishing with an outrageous penalty an unintentional failure to report in a water shed [sic] that the board knows because of its authorship of the Report of Referee Upper Uvas Creek Reference and the Supplement to Report of Referee Upper Uvas Creek Reference **that the data to be gained is useless.** They know the Upper Uvas Creek produces no water or an amount of water so minuscule as

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to make no difference to the states needs in a low water year. They also know that the creek has been deemed fully appropriated. They severely punish for not doing what is a useless act. This is an error in law Calif Code Regulations §768(d)” (Petition, p. 1, bold in original.)

Response: Order WR 2021-0001 addresses Petitioner’s argument that there is no reason for diverters of water under riparian claims to have to file supplemental statements of water diversion and use:

There is no general exception in Water Code section 5101 for diversions under riparian rights claims. For the reasons described in detail in Mr. Cervantes’s testimony, the Board needs to receive timely and accurate reports of all amounts of water diverted under riparian rights claims in California so that the Board can effectively administer California’s water rights system.

(Order WR 2021-0001, p. 19.) We disagree with Petitioner’s argument that the data that must be listed in his supplemental statements of water diversion and use are “useless.” To the contrary, data regarding all diversions and use of water in California are critically important to the Board.

Petitioner’s Argument 5: “The order punishes the inadvertent failure to file a report that is not read or needed. This is an abuse of discretion Calif Code Regulations §768a” (Petition, p. 2.)

Response: Petitioner’s argument is incorrect. See response to Petitioner’s Argument 4.

Petitioner’s Argument 6: “The order was based on procedures that deny due process and are designed to confuse as it asks for the type communication desired when the respondent requests for communication by mail it fails to set up a process to do just that. It is an irregularity in the proceeding because it failed to give the time needed to amass the information to report and defend correctly. Notices were received to [sic] late to respond to deadlines. The Petition for Reconsideration letter is only one of the examples. It was mailed February 1, 2021. Given the usual 5 days for mail to be received it is received to [sic] late to file a petition for reconsideration within the deadline given. Calif Code Regulations §768a” (Petition, p. 2.)

Response: Order WR 2021-0001 discusses Petitioner’s failure to timely file a notice of intent to appear at the AHO hearing and the AHO’s actions to reschedule the hearing to accommodate Petitioner’s schedule. (Order WR 2021-0001, pp. 4-5.) Petitioner participated in the hearing the AHO rescheduled for July 24, 2020 and did not raise any arguments about the hearing schedule.

Petitioner participated in the January 5, 2021 Board meeting, and thus was aware that the Board adopted Order WR 2021-0001 on that date. Petitioner could have reviewed Water Code section 1122 to determine that there was a 30-day deadline for filing his petition for reconsideration of Order WR 2021-0001. Petitioner filed a timely petition for reconsideration and has not demonstrated that the timing of the Board’s courtesy notice to him of the 30-day deadline resulted in any prejudice to him.

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Petitioner's Argument 7: "There was an irregularity because the subject of the complaint should have been able to standing [sic] on his constitutional rights without even reporting and been immune from a civil penalty. Calif Code Regulations §768a and d" (Petition, p. 2.)

Response: During the AHO process, Petitioner made similar unsupported arguments regarding the alleged impacts of the ACL Complaint on his constitutional rights. (See Order WR 2021-0001, p. 19.) Petitioner has not provided any additional details about these arguments, and Petitioner has not submitted a statement of points and authorities in support of his legal issues, as required by section 769, subdivision (c) of the regulations.

Regarding the Board's need for the data in supplemental statements of water diversion and use, see Response to Petitioner's Argument 4.

Petitioner's Argument 8: "The order penalizes the assertion of the constitutional position that the is [sic] reporting system is constitutionally invalid because the statutory framework does not require the Water Board to provide formal yearly notice of the duty to file like the paper system sending of a form did. (See page 9 last paragraph Page 10 line 1 and 2 of the Order) A civil penalty in this context is an error in law. Calif Code Regulations §768d" (Petition, p. 2.)

Response: Order WR 2021-0001 addresses this argument:

Respondent has not demonstrated that there is any constitutional requirement for the Board to notify filers of supplemental statements of their filing deadlines. Moreover, the Division of Water Rights formally notified Respondent through a letter dated February 15, 2019 of the July 1, 2019 filing deadline. (Exh. PT-2.) The Division also notified Respondent on August 30, 2019 of his failure to meet this deadline, which was more than six weeks before the Division issued its ACL Complaint. (Exh. PT-5.)

(Order WR 2021-0001, p. 17.)

Petitioner's Argument 9: "The amounts of water missed by the failure to file created no extent of harm as they were minuscule. The finding is in error as it declares the law is meaningless as to extent because any non reporting creates the same kind of harm. The finding is not supported by the evidence of the law. Calif Code Regulations §768b and d" (Petition, p. 2.)

Response: As the Division informed Petitioner through the Notice of Deficiency, annual reporting is required "even if no water was diverted or used." (Exh. PT-5, underlining in original; Order WR 2021-0001, pp. 2 & 9.) To carry out its functions, the Board needs the data in *all* supplemental statements of water diversion and use, even those where there were no diversions during the reporting year.

Regarding Petitioner's challenge to the utility of his supplemental statements and of the information in them, and the extent of harm caused by violating these reporting requirements, see response to Petitioner's Argument 4.

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Petitioner's Argument 10: "The finding that my testimony indicates I question the importance of timely findings or their necessity is in error. The evidence indicated [sic] series of attempts to get information to make a better filing. **The evidence only indicates questioning the constitutionality.** The evidence indicates once the system is understood the reports have always been filed prior to the computer system. It was the computer systems reeducation component and water boards changes in procedures that caused the failure to file. Calif Code Regulations §768b and d" (Petition, p. 2, bold in original.)

Response: This argument appears to address the following sentence in Order WR 2021-0001: "Also, Mr. Simoni's hearing testimony indicates that he still questions the importance of timely filings and whether it is even necessary for him to file annual reports." (Order WR 2021-0001, p. 13.)

This statement is supported by substantial evidence in the administrative record. For example, Petitioner made the following arguments during the AHO proceeding: (a) the Board may not require the reporting of Petitioner's diversions because his and his neighbors' riparian rights were adjudicated and a watermaster was appointed (*id.*, p. 19); (b) there is no reason for diverters of water under riparian rights to have to file supplemental statements because their system is "self-enforcing" (*id.*); (c) it is inappropriate for the Board to require Petitioner to use the Board's electronic filing system to file his supplemental statements (*id.*, pp. 20-21); and (d) the reporting requirements may have a "chilling effect" (*id.*, p. 21).

Order WR 2021-0001 explains the Board's need for the computerized reporting forms. (*Id.*, pp. 20-21.)

Petitioner's Argument 11: "Most egregiously abuse of discretion and illegality in the order is that the penalty is based on evidence manufactured by the computer system not the evidence before the hearing officer. The Declaration Under Penalty of Perjury makes it clear that the testimony was a maximum potential usage of 300 to 500 [sic] per year. The Hearing officer basis [sic] his penalty on a report of an impossible diversion of 6,000 acre feet per year. The computer added the numbers used to indicate usage every month as the prior forms used check boxes for the months of use. **The basing of a penalty on evidence the Board's System makes up is a gross violation of due process.** Calif Code Regulations §768b and d" (Petition, p. 2, bold in original.)

Response: The analysis and these conclusions in Order WR 2021-0001 regarding the administrative civil liability amount are based on substantial evidence in the administrative record, which is cited in the order. See response to Petitioner's Argument 1.

Petitioner's Argument 12: "The order punishes an attempt to have a discussion on the constitutionality of the reporting system. Calif Code Regulations §768 b and d." (Petition, pp. 2-3.)

Response: The administrative civil liability amount in Order WR 2021-0001 is based on substantial evidence in the administrative record, not the fact that Petitioner asked for a

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hearing or made legal arguments during the hearing process. See responses to Petitioner's Arguments 1 and 3.

Petitioner's Argument 13: "The order is discriminatory as non [sic] of the other users who have failed and continue to fail to file use reports are prosecuted. Calif Code Regulations §768" (Petition, p. 3.)

Response: Petitioner has not submitted any evidence to support his argument and it is not correct. The Division files administrative civil liability complaints against people and entities that were required to file annual water-right reports for diversions and use during the previous year and did not do so.

Petitioner's Argument 14: "The proceedings have not given the user sufficient time to determine the reporting needs of the Board so that the decisions and reports can be based on actual use as they apply to this property. There is more relevant evidence which, in the exercise of reasonable diligence could not be produced. i.e. the actual usage. Calif Code Regulations §768c." (Petition, p. 3.)

State Water Board's Response: Order WR 2021-0001 discusses the resources that are available to people who divert water and are required to file statements of water diversion and use. (Order WR 2021-0001, p. 18.) Petitioner had six months after the end of 2018 to prepare his supplemental statement of water diversion and use for his 2018 diversion and to file it by the July 1, 2019 deadline.

Petitioner has not submitted an affidavit or declaration stating that additional evidence is available that was not presented to the board and the reason it was not presented, as required by section 769, subdivision (b) of the regulations.

Petitioner may file amended supplemental statements of water diversion and use for his diversions during past years if he now better understands the applicable requirements. The Board encourages Petitioner to do this.

5.0 CONCLUSION

For the foregoing reasons, the State Water Board concludes that the Board's adoption of Order WR 2021-0001 was appropriate and proper. Petitioner's petition for reconsideration lacks merit and should be denied.

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ORDER

IT IS HEREBY ORDERED that:

1. The petition for reconsideration of Order WR 2021-0001 filed by James V. Simoni (Petitioner) is denied.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on August 3, 2021.

Jeanine Townsend
Clerk to the Board